IRENE WONG SOOK LIN & ORS v. DATUK AU YEE BOON & ORS

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG J
[ORIGINATING SUMMONS NO: WA-24NCC-380-07-2023]
15 NOVEMBER 2024

Abstract – *Shareholders seeking to bring a derivative action must demonstrate they are acting in good faith and not for a collateral purpose. Mere allegations are insufficient; evidence is required to support the claims. Courts generally defer to the business judgment of company directors unless there is evidence of improper conduct, dishonesty, or a decision made in bad faith. Shareholders cannot substitute their own judgment for that of the directors in matters of business and commercial decisions.*

COMPANY LAW: *Derivative action – Leave – Minority shareholders/applicants of company alleged that there was breach of fiduciary duties by executive and/or non-independent directors of company – Applicants acquired shares in company for sole purpose to obtain locus standi to file derivative leave originating summons – Allegations that directors controlled and/or caused company to be used as vehicle to acquire shares of company – Whether applicants had interest in corporate governance – Whether applicants acted in good faith – Whether best interest of company that application for leave be granted – Whether applicants were genuinely aggrieved minority interests*

The first applicant had acquired 26,000 shares while the second and third applicants had acquired 10,000 shares each respectively, in the fourth respondent. The first applicant was previously practising in the law firm of Messrs Gideon Tan Razali Zaini ('GTRZ') who were the solicitors for South Malaysia Industries Bhd ('SMI'), a public listed company which was the target company in a corporate fight between SMI and two subsidiaries of Prolexus Bhd ('fourth respondent'). The two subsidiaries were Honsin Apparel Sdn Bhd ('Honsin Apparel') and HIQ Media (Malaysia) Sdn Bhd ('HIQ Media') ('companies'). The facts disclosed that the companies had written to the Board of Directors of SMI: (i) stating their intention to move resolutions and to call for an extraordinary general meeting ('EGM') of SMI to be held on 24 March 2023 ('first proposed EGM') ('first notice'); and (ii) requesting for the records of depositors ('ROD') of SMI to be furnished before 22 February 2023. On 21 February 2023, SMI's Board of Directors made an announcement to Bursa Malaysia, stating, amongst others, that: (i) the first notice was defective and not in the best interest of SMI; (ii) the first notice was defective as no grounds were given as to why the companies were seeking to remove the members of the Board of Directors of SMI;

(iii) the appointment of the two directors to replace the Board of Directors would be insufficient to safeguard the assets of SMI and the interest of its shareholders; and (iv) the Board of Directors of SMI would meet on 24 February 2023 to discuss the matter. After the deadline given for the ROD to be provided had passed, on 7 March 2023, the companies commenced originating summons in the High Court ('OS 103'). SMI filed an application to strike out on the basis that OS 103 was filed prematurely as SMI had not given a clear refusal to provide the ROD. OS 103 was then struck out. On 18 April 2023, the companies again wrote to the SMI's Board of Directors, stating their intention to move resolutions and to call for an EGM of SMI to be held on 31 May 2023 ('second proposed EGM') ('second notice'). The companies also requested for the ROD in the second notice. One week before sending the letter, on 2 May 2023, the first to third applicants had acquired their shares in the amount stated earlier. On 3 May 2023, SMI wrote to Honsin Apparel that SMI would not be providing the companies the ROD as requested on the ground that the companies had purportedly breached s. 218(2) of the Capital Markets and Services Act 2007 ('CMSA'). On 9 May 2023, the applicants, through their solicitors, Messrs Yap Siew Yee & Co ('YSY'), sent a letter to the fourth respondent's Board of Directors, in particular the independent directors, raising theirs concerns as to the Board of Directors' decision in acquiring the shares in SMI. Besides the applicants, the letter was also sent on behalf of one Yap Yoon Jan ('YYJ'). The companies commenced proceedings in the High Court, seeking for the ROD. On 6 June 2023, the fourth respondent, *via* their solicitors, Messrs Wong Kian Kheong ('WKK'), responded to YSY's letter, stating that: (i) the applicants and YYJ were not in the fourth respondent's record of depositors before 3 May 2023; (ii) YYJ, the client of YSY, was also a partner in YSY; (iii) YYJ and the first applicant were also previously practising in GTRZ who were the solicitors for SMI; and (iv) the acquisitions of Prolexus Bhd shares by the applicants and YYJ to gain *locus standi* to obtain leave to commence a derivative action were not in good faith and for a collateral purpose related to OS 103, 154 and 269. YSY later replied to WKK's letter, asserting that their clients were acting in good faith and have an interest in corporate governance. WKK replied to YSY's letter, stating that their clients did not accept YSY's client's contentions. The plaintiffs then filed the derivative leave originating summons. OS 269 was allowed but the Court of Appeal granted a stay of execution of the order pending an appeal by SMI and its directors. The applicants contended that: (i) they were minority shareholders of the fourth respondent; (ii) the acquired knowledge from the cause papers for OS 103 and a press release by The Edge Markets on 10 April 2023, that the first to third respondents had breached their fiduciary duties towards the fourth respondent by controlling and/or causing the fourth respondent to be used as a vehicle to acquire shares of SMI; (ii) having an interest in corporate governance, the applicants decided to become the minority shareholder activists with the intention to act in the public

A shareholders' interest in questioning the independence of the fourth respondent's Board of Directors; (iii) there was a highly probable case where the fourth respondent was used as a vehicle in their acquisition of SMI shares and their attempt to seize control of SMI which did not have any synergies and/or expertise to manage SMI ('applicants' first contention'); and (iv) the B first to third respondents failed to disclose their personal interest and/or their contention with persons acting in concert ('PACs') and/or the interest of the PACs who had collectively acquired SMI's shares in the same period of time ('applicants' second contention'). The first to third respondents were acting in a non-transparent and opaque manner which was severely detrimental to C the fourth respondent company's corporate governance and had disregarded all other individual minority shareholders' interests. The issues that arose before the court were: (i) whether the applicants were acting in good faith; and (ii) whether it appeared *prima facie* to be in the best interest of the company that the application for leave be granted.

D **Held (dismissing application):**

(1) If the applicants' story (as set out in paras. [61] and [62] of the judgment) was honestly believed by the applicants, it was indeed benevolent and laudable of the applicants to incur time not to mention expense to buy shares in the fourth respondent to become minority shareholder activists E because of an interest in corporate governance. It was also admirable of them to also incur time and legal expense to file this derivative leave OS. However, no evidence had been presented to the court to show the applicants had a track record of having an interest in corporate governance, were members of any NGOs involved in corporate F governance or had previously engaged in corporate governance litigation as minority shareholder activists. Instead, evidence revealed that the first applicant was previously practising in the law firm of GTRZ who were the solicitors for SMI which was the target company in a corporate fight between SMI and two subsidiaries of the fourth respondent. The G applicants were unable to dispel the respondent's contention that they were agent provocateurs planted to create trouble for the respondents. The lack of candidness on the part of the applicants indicated a lack of good faith. Further, the applicants failed to show, on a balance of probabilities, that they were not seeking to bring the derivative suit for a collateral purpose. (paras 64-68)

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(2) The applicants' first contention was not supported by any evidence to show 'the fourth respondent was used as a vehicle in their acquisition of SMI shares and their attempt to seize control of SMI which does not have any synergies and/or expertise to manage SMI'. Instead, the I applicants relied on the failure of the first to third respondents to answer substantively their queries contained in their solicitors' letter, giving the requisite 30-day notice prior to the filing of the derivative leave OS. A court should not interfere and substitute its own judgment in the business

and commercial decision of the directors in the absence of any evidence showing improper conduct by the directors or that the decision was not honestly made. (paras 72, 73 & 79)

(3) The applicants' second contention had not been proven by the applicants on a balance of probabilities. Further, a complaint had been made to the Securities Commission ('SC') and rejected by the SC. It is settled law that it is for the SC to determine that there is any contravention of the CMSA and it is not for the court to usurp the role of the regulators. The applicants failed to show on a balance of probabilities that they were acting in good faith. On this ground alone, the application for leave to issue a derivative action could be dismissed. (paras 82-84 & 88)

(4) The applicants failed to show that it appeared *prima facie* to be in the best interest of the company that the application for leave be granted, for the following reasons: (i) the applicants acquired a total of 46,000 shares for the sole purpose to obtain the *locus standi* to file this derivative leave OS. Their total shareholding of 46,000 out of 276,727,513 issued shares of the fourth respondent was a mere 0.00017%. None of the other 99.99983% shareholders shared their grievance; (ii) the companies' investment in the shares of SMI were carried out before the applicants' acquired shares in the fourth respondent and before the applicants became members of the fourth respondent. In these circumstances, the applicants' interest as members of the fourth respondent were not affected at all by the said investment. Indeed, the applicants decided to acquire the shares in the fourth respondent with full knowledge of the companies' investment in the shares of SMI; and (iii) the applicants' case was premised upon a complaint by SMI where it was alleged that there was a purported breach of s. 218 of the CMSA by the companies. In any event, the SMI complaint had been rejected by the SC. Ultimately, it had not been proven that the applicants were genuinely aggrieved minority interests. (para 93)

Case(s) referred to:

Ang Thiam Swee v. Low Hian Chor [2013] 2 SLR 340 ***(refd)***
Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA ***(refd)***
Jian Li Investments Holding Pte Ltd v. Healthstats International Pte Ltd [2019] 4 SLR 825 ***(refd)***
Lai Soon Onn v. Chew Fei Meng & Other Appeals [2018] 10 CLJ 48 CA ***(refd)***
Lembaga Tabung Angkatan Tentera v. Prime Utilities Bhd [2013] 8 CLJ 38 HC ***(refd)***
Ontario Ltd v. Bernstein (2000 OTC Lexis 3480) ***(refd)***
Pang Yong Hock v. PKS Contracts Services Pte Ltd [2004] 3 SLR(R) 1 ***(refd)***
Shahidan Shafie v. Atlan Holdings Sdn Bhd & Anor [2017] 4 CLJ 587 CA ***(refd)***
Swansson v. RA Pratt Properties Pty Ltd & Anor [2002] NSWSC 583 ***(refd)***
Tai May Chean v. United Eastern Resources Sdn Bhd & Anor [2022] 2 CLJ 757 CA ***(refd)***
Tiong Sze Yin Serene v. HC Surgical Specialist Ltd [2021] 3 SLR 1269 ***(refd)***

Legislation referred to:
Capital Markets and Services Act 2007, s. 218(2)
Companies Act 1965 (repealed), ss. 181A, 181B(4), 181C, 181D, 181E
Companies Act 2016, ss. 310(b), 345, 347(3), 348(4)(a), (b), 349, 350
Rules of Court 2012, O. 7 r. 2

Companies Act (Chapter 50) [Sing], s. 216A(3)
Corporations Act 2001 [Aus], s. 237(2)

For the plaintiff - Gideon Tan, Yap Yoon Jan & Yip Man Fei; M/s Yap Siew Yee & Co
For the defendant - Alex Tan Chie Sian & Cheah Kha Mun; M/s Wong Kian Kheong

Reported by Lina E

JUDGMENT

Leong Wai Hong J:

Introduction

[1] This is an application *via* an originating summons dated 12 July 2023 in encl. 1 by three applicants to be granted leave to commence a derivative action against the first to third respondents in the name of the fourth respondent ("derivative leave OS").

[2] The applicants assert that "having an interest in corporate governance, the applicants decided to become the minority shareholder activists with the intention to act in the public shareholders' interest in questioning the independence of the fourth respondent's Board of Directors". (See applicants' written submissions encl. 43 para. 7).

[3] The derivative leave OS is filed pursuant to s. 347 read with s. 348 of the Companies Act 2016 [Act 777] ("CA 2016").

[4] The derivative leave OS asked for the following orders:

(i) that the applicants be granted leave to commence a derivative action in the name of the fourth respondent against the first to third respondents;

(ii) that the applicants as the minority shareholders of the fourth respondent be granted full control over the conduct and carriage of all aspects of the proceedings/action by the fourth respondent against the first to third respondents;

(iii) such further and/or other relief deemed fit and appropriate by this Honourable Court; and

(iv) that costs of the applicants herein and/or costs of the fourth respondent are to be borne by the first to third respondents.

On Correct Nomenclature

[5] The OS identifies the parties as applicants and respondents. The respondents identify the parties as plaintiffs and defendants. The correct designations are plaintiffs and defendants as this is an OS. If it is an *ex parte* OS then the party filing it is described as the applicant. (See O. 7 r. 2 of the Rules of Court 2012). For good order, I shall identify the parties as applicants and respondents since these are the designations used (wrongly) by the applicants.

Material Background Facts Of The Case

The Parties

[6] The first applicant is Irene Wong Sook Lin, who acquired 26,000 unit of shares on 3 May 2023 in the fourth respondent. The second applicant is Kwan Kum Loy, who acquired 10,000 unit of shares on 2 May 2023 in the fourth respondent. The third applicant is Lee Ceh Chan who acquired 10,000 unit of shares on 2 May 2023 in the fourth respondent.

[7] The first applicant, Irene Wong Sook Lin, was previously practising in the law firm of Messrs Gideon Tan Razali Zaini ("GTRZ"), who are the solicitors for South Malaysia Industries Berhad ("SMI"), which is the target company in a corporate fight between SMI and two subsidiaries of Prolexus Berhad the fourth respondent, now before the courts in three suits, the facts of which I will set out below. Mr Gideon Tan also appears as counsel for the applicants before me.

Note - Counsel for the applicants in the affidavits has defined South Malaysia Industries Berhad as SMIB but as SMI in his written submissions. For good order, I shall call this company SMI.

[8] The dates of acquisitions are material as they show the applicants acquired their shares after the alleged breach of directors' duties by the first to third respondents. The involvement of the first applicant, Irene Wong Sook Lin, previously practising in the law firm of GTRZ and Mr Gideon Tan of GTRZ appearing as counsel for the applicants before me are also material. They all go to the twin issues of good faith and collateral purpose in s. 348(4) of the CA 2016 which I shall address below.

[9] The first respondent is Datuk Au Yee Boon. The second respondent is Tan Eik Huang. The third respondent is Au Yee Soon. At all material times, the first to third respondents are the executive and/or non-independent directors of the fourth respondent. The fourth respondent is Prolexus Berhad, a public listed company incorporated in Malaysia.

Good Practice

[10] The material background facts presented by counsel, while useful, are slanted to support their individual cases. (See encl. 43 applicants' written submissions at paras. 4 to 12 and encl. 41 respondents' written submissions at paras. 3 to 33).

[11] It is always good practice to set out the material background facts in chronological order to give a full picture to the court to arrive at a fair and just decision. This is especially so in an application for leave to commence a derivative action.

[12] The material background facts in chronological order are as follows.

Events Pre - The Derivative Leave OS

[13] There is a public listed company called SMI.

[14] On 17 February 2023, two companies called Honsin Apparel Sdn Bhd ("Honsin Apparel") and HIQ Media (Malaysia) Sdn Bhd ("HIQ Media") – (collectively "companies") – wrote to the Board of Directors of SMI:

(i) stating their intention to move resolutions and to call for an Extraordinary General Meeting ("EGM") of SMI to be held on 24 May 2023 ("first proposed EGM") pursuant to s. 310(b) of the CA 2016. ("first notice").

(ii) requesting for the record of depositors ("ROD") of SMI to be furnished before 22 February 2023.

(See encl. 13 para. 19 at p. 7 (PDF p. 7). These facts are not disputed by the applicants in their reply affidavit dated 2 January 2024 encl. 22).

[15] The companies are subsidiaries of Prolexus Berhad, the fourth defendant, a public listed company.

[16] On 21 February 2023, SMI's Board of Directors made an announcement to Bursa Malaysia stating, amongst others:

(i) that the first notice was defective and not in the best interest of SMI;

(ii) the first notice was also defective because no grounds were given as to why the companies were seeking to remove the members of the Board of Directors of SMI;

(iii) the appointment of two directors to replace the Board of Directors would be insufficient to safeguard the assets of SMI and the interest of its shareholders; and

(iv) the Board of Directors of SMI would meet on 24 February 2023 to discuss the matter.

(See encl. 13 para. 20 at p. 7 (PDF p. 7). These facts are not disputed by the applicants in their reply affidavit dated 2 January 2024 encl. 22).

Disputes Between SMI And The Companies

OS 103

[17] After the deadline given for the ROD to be provided had passed, on 7 March 2023, the companies commenced proceedings in KLHC OS No. WA-24NCC-103-02/2023 ("OS 103"). SMI filed an application to

strike out on the basis that OS 103 was filed prematurely as SMI had not given a clear refusal to provide the ROD. On 17 April 2023, the court struck out OS 103.

(See encl. 13 paras. 21 to 24 at pp. 7 to 8 (PDF pp. 7 to 8). These facts are not disputed by the applicants in their reply affidavit dated 2 January 2024 encl. 22).

[18] The Edge Markets reported on 10 April 2023:

> The Securities Commission Malaysia (SC) said it is looking into a complaint filed by South Malaysia Industries Bhd (SMI), in which the group accused that some parties acting in concert violated the Capital Markets and Services Act 2007 (CMSA) in accumulating shares without making a mandatory general offer (MGO).
>
> The SC has received a complaint from SMI, and we are currently looking into the matter," the regulator told The Edge.

(see supporting affidavit encl. 11 vol. 10 pp. 1871 to 1873. Counsel has wrongly identified the ref as encl. 10 vol. 9 in his encl. 43 applicants' written submissions at para. 6).

OS 269

[19] On 18 April 2023, the companies again wrote to the SMI's Board of Directors, stating their intention to move resolutions and to call for an EGM of SMI to be held on 31 May 2023 ("second proposed EGM") pursuant to s. 310(b) of the CA 2016 ("second notice"). The companies also requested for the ROD in the second notice.

The Emergence Of The Applicants As Alleged Minority Shareholder Activists With The Intention To Act In The Public Shareholders' Interest

[20] The applicants contend that:

> 5. Sometime in April 2023, the Applicants opined that the first to third Respondents, being the executive and/or non-independent directors of the fourth Respondent, have breached their fiduciary duties towards the fourth Respondent by controlling and/or causing the fourth Respondent to be used as a vehicle to acquire shares of SMI.
>
> 6. The above was based on the Applicants' knowledge derive from the cause papers for a suit, bearing suit no. Kuala Lumpur Originating Summons No. WA-24NCC-103-02/2023 and a press release by The Edge Markets on 10.4.2023.
>
> 7. The Applicants were of the view that first to third Respondents' abovementioned actions are highly questionable. Due to the aforesaid and having an interest in corporate governance, the Applicants decided to become the minority shareholder activists with the intention to act in the public shareholders' interest in questioning the independence of the fourth Respondent's board of directors.

A 8. On or about 9.5.2023, the Applicants instructed their solicitors to send a letter dated 9.5.2023 to the fourth Respondent's board of directors, in particular the independent directors raising their concerns as to the board of directors' decision in acquiring the shares in SMIB.

(see applicants' written submissions encl. 43 paras. 5 to 8).

B **[21]** One week before sending the letter, on 2 May 2023, the second applicant had acquired 10,000 unit of shares in the fourth respondent. On 2 May 2023, the third applicant had acquired 10,000 unit of shares in the fourth respondent. On 3 May 2023, the first applicant had acquired 26,000 unit of shares in the fourth respondent. These purchases give them the *locus* C *standi* to file this derivative leave OS.

[22] As mentioned earlier, the first applicant was previously practising in the law firm of GTRZ. GTRZ are the solicitors for SMI which is the target company in the corporate dispute between SMI and two subsidiaries of Prolexus Berhad the fourth defendant, before the courts in OS 103 and OS D 269. Mr Gideon Tan also appears as counsel for the applicants before me.

[23] On 3 May 2023, SMI wrote to Honsin Apparel that SMI would not be providing the companies the ROD as requested on the grounds that the companies have purportedly breached s. 218(2) of the Capital Markets and E Services Act 2007 ("CMSA").

(See encl. 13 paras. 25 to 30 at pp. 8 to 9 (PDF pp. 8 to 9). These facts are not disputed by the applicants in their reply affidavit dated 2 January 2024 encl. 22 and in the applicants' reply written submissions encl. 48).

F **[24]** On or about 9 May 2023, the applicants, through their solicitors, Messrs Yap Siew Yee & Co ("YSY"), sent a letter dated 9 May 2023 to the fourth respondent's Board of Directors, in particular the independent directors, raising their concerns as to the Board of Directors' decision in acquiring the shares in SMI. It is significant that besides the applicants here, the letter was also sent on behalf of one Yap Yoon Jan ("YSY's letter dated G 9 May 2023").

(See letter from Messrs Yap Siew Yee & Co dated 9 May 2023 at exh. "A-4", at pp. 1875 to 1888/pp. 68 to 81 of applicants' affidavit vol. 10 (encl. 11).

H **[25]** Yap Yoon Jan, along with the first applicant, was previously practising in the law firm of GTRZ.

[26] On 15 May 2023, the companies commenced proceedings in KLHC OS No: WA-24NCC-269-05-2023 ("OS 269") seeking for the ROD.

I **[27]** On 6 June 2023, the fourth respondent *via* their solicitors, Messrs Wong Kian Kheong (WKK) responded to YSY's letter dated 9 May 2023 stating that:

(i) the applicants and Yap Yoon Jan were not in the fourth respondent's record of depositors before 3 May 2023;

(ii) Yap Yoon Jan, the client of Messrs Yap Siew Yee & Co, is also a partner in Messrs Yap Siew Yee & Co;

(iii) Yap Yoon Jan and the first applicant were also previously practising in the law firm of GTRZ who are the solicitors for SMI.

(iv) the acquisitions of Prolexus Berhad shares by the applicants and Yap Yoon Jan to gain *locus standi* to obtain leave to commence a derivative action were not in good faith and for a collateral purpose related to OS 103, OS 154 and OS 269.

(See letter from WKK dated 6 June 2023 at exh. "A-5", at pp. 1890 to 1893/pp. 83 to 86 of applicants' affidavit vol. 10 (encl. 11)).

[28] On 20 June 2023, YSY replied to WKK's letter dated 6 June 2023, asserting that their clients were acting in good faith and have an interest in corporate governance.

[29] On 23 June 2023, WKK replied to YSY letter dated 20 June 2023 stating that their clients do not accept YSY's clients' contentions.

(See exhs. "A-6 and A-7", at pp. 1895 to 1900/pp. 88 to 93 of applicants' affidavit vol. 10 (encl. 11)).

[30] On 12 July 2023, the applicants filed the derivative leave OS.

[31] On 2 October 2023, OS 269 was allowed but the Court of Appeal on 27 October 2023 granted a stay of execution of the order pending an appeal by SMI and its directors.

The Pleaded Case Of The Applicants

[32] The applicants' case *via* their counsel, Mr Gideon Tan, is that:

(i) they are minority shareholders of the fourth respondent;

(ii) they acquired knowledge from the cause papers for OS 103 and a press release by The Edge Markets on 10 April 2023 – which I have set out above – that the first to third respondents have breached their fiduciary duties towards the fourth respondent by controlling and/or causing the fourth respondent to be used as a vehicle to acquire shares of SMI; and

(iii) having an interest in corporate governance, the applicants decided to become the minority shareholder activists with the intention to act in the public shareholders' interest in questioning the independence of the fourth respondent's Board of Directors.

(See applicants' written submissions encl. 43 paras. 5 to 7).

[33] The applicants further contend:

(i) there is a highly probable case where the fourth respondent was used as a vehicle in their acquisition of SMI shares and their attempt to seize control of SMI, which does not have any synergies and/or expertise to manage SMI; and

(ii) the first to third respondents failed to disclose their personal interest and/or their connection with persons acting in concert ("PACs") and/or the interest of the PACs who have collectively acquired SMI's shares in the same period of time. The first to third respondents are acting in a non-transparent and opaque manner, which is severely detrimental to the fourth respondent company's corporate governance and disregards all other individual minority shareholders' interests.

(see applicants' written submissions encl. 43 paras. 3 to 3.2).

The Pleaded Case Of The Respondents

[34] The respondents' counsel, Mr Alex Tan, contends:

(i) the applicants are not acting in good faith;

(ii) firstly, there is no good cause of action and no reasonable prospect of success. The acquisition of the shares in SMI by the companies was essentially a business judgment and the decision to invest in the shares of SMI was carried out in accordance with the law, for a proper purpose and in good faith in the best interest of the fourth respondent. The court should not interfere and substitute its own judgment in the business and commercial decision of the fourth respondent;

(see respondents' submissions encl. 41 at paras. 38 to 40).

(iii) secondly, the sole purpose the applicants acquiring the shares in the fourth respondent was to confer on them the *locus standi* to file this derivative leave OS. Their total shareholding is only 46,000 out of 276,727,513 issued shares of the fourth respondent. In short, a mere 0.00017%;

(see respondents' further submissions encl. 59 at paras. 26 to 28).

(iv) thirdly, the companies' investment in the shares of SMI were carried out before the applicants acquired shares in the fourth respondent and before the applicants became members of the fourth respondent. In those circumstances, the applicants' interests as members of the fourth respondent are not affected at all by the said investment. Indeed, it is clear that the applicants had decided to acquire the shares in the fourth respondent with full knowledge of the companies' investment in the shares of SMI;

(v) fourthly, the essence of the applicants' case is premised upon a complaint by SMI to the Securities Commission Malaysia ("SC") on 23 March 2023 ("SMI complaint"). In the SMI complaint, it was alleged, which is denied, that there was a purported breach of s. 218 of the CMSA by the companies. It is settled law that until SC has determined that there is any contravention of the CMSA, it is not for the court to usurp the role of the regulators;

(see respondents' submissions encl. 41 at paras. 44 to 47).

(vi) finally, it is plain that the applicants do not have anything obvious to gain directly by the success of the derivative action and it can be reasonably inferred that the applicants' intention to commence derivative proceedings is for a collateral purpose, namely to frustrate the statutory rights of the companies as shareholders of SMI to convene a members' meeting and to remove and appoint directors of SMI;

(vii) this can be surmised based on the facts and the proximity of the relationship between the first applicant, the applicants' solicitors and Messrs GTRZ, the solicitors acting for SMI in OS 103, OS 154 and OS 269. It is not in dispute that one of the partners of the applicants' solicitors, YYJ and the first applicant were previously practising in GTRZ. YYJ was also one of the shareholders that instructed YSY to issue YSY's letter dated 9 May 2023.

(see respondents' submissions encl. 41 at para. 48).

Relevant Sections In CA 2016 On Leave To Commence A Statutory Derivative Action

[35] The law on leave to commence a statutory derivative action is well-settled. The relevant sections are ss. 345, 347 to 350 of the CA 2016.

[36] The predecessors to ss. 345, 347 to 350 of the CA 2016 are ss. 181A to 181E of the Companies Act 1965 ('CA 1965').

[37] The material change is in s. 347(3) of the CA 2016, where the right to bring a derivative action under common law which was preserved in the old s. 181A of the CA 1965 is now expressly abrogated.

[38] Our s. 348(4) of the CA 2016 is similar to s. 216A(3) of the Singapore Companies Act (Chapter 50) and s. 237(2) of the Australian Corporations Act 2001. (See *Tai May Chean v. United Eastern Resources Sdn Bhd & Anor* [2022] 2 CLJ 757; [2022] 4 MLJ 779, per Lee Swee Seng JCA at (36 to 37)). Cases from these two jurisdictions are therefore useful for our consideration.

[39] Our s. 345 of the CA 2016 reads as follows:

Interpretation

For the purposes of this Division, "complainant" means:

(a) a member of a company, or a person who is entitled to be registered as a member of a company;

(b) a former member of a company if the application relates to the circumstances in which the member ceased to be a member;

(c) any director of a company; or

(d) the Registrar, in the case of a company declared under section 590.

[40] Section 347 of the CA 2016 reads as follows:

Derivative proceedings

(1) A complainant may, with the leave of the court initiate, intervene in or defend a proceeding on behalf of the company.

(2) Proceedings brought under this section shall be brought in the company's name.

(3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is abrogated.

[41] Section 348 of the CA 2016 reads as follows:

Leave of Court

(1) An application for leave of the court under s. 347 shall be made to the court without the need for an appearance to be entered.

(2) The complainant shall give thirty days' notice in writing to the directors of his intention to apply for the leave of court under s. 347.

(3) Where leave has been granted for an application under s. 347, the complainant shall initiate proceedings in court within thirty days from the grant of leave.

(4) In deciding whether or not the leave shall be granted, the court shall take into account **whether**:

(a) **the complainant is acting in good faith**; and

(b) **it appears *prima facie* to be in the best interest of the company** that the application for leave be granted.

(emphasis added)

(5) Any proceedings brought, intervened in or defended under this section shall not be discontinued, compromised or settled except with the leave of the court.

[42] Section 349 of the CA 2016 reads as follows:

Effect of ratification

If members of a company, ratify or approve the conduct of the subject matter of the action:

(a) the ratification or approval does not prevent any person from bringing, intervening in or defending proceedings with the leave of the court;

(b) the application for leave or action brought or intervened in shall not be stayed or dismissed by reason only of the ratification or approval; and

(c) the court may take into account the ratification or approval in determining what order to make.

[43] Section 350 of the CA 2016 reads as follows:

Powers of the court

In granting leave under this section and section 347 and 348, the court may make such other orders as the court thinks appropriate including an order:

(a) authorising the complainant or any other person to control the conduct of the proceedings;

(b) giving directions for the conduct of the proceedings;

(c) for any person to provide assistance and information to the complainant, including to allow inspection of the company's books;

(d) requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the application or action, or pending the grant of the leave or pending the grant of any injunction by the court hearing the application for leave under this section; or

(e) the costs of the complainant, the company or any other person for proceedings taken under this section, including an order as to indemnity for costs.

Issues Before The Court

[44] Section 348(4) of the CA 2016 states that in deciding whether or not the leave shall be granted, the court shall take into account whether:

(a) the complainant is **acting in good faith**; and

(b) it appears *prima facie* to be **in the best interest of the company** that the application for leave be granted.

(emphasis added)

[45] The respondents contend that the applicants have failed to satisfy both limbs [a] and [b] of s. 348(4) of the CA 2016. I shall consider limb [a] followed by limb [b].

[46] There is no dispute that the applicants, as the fourth respondent's shareholders, come within the statutory meaning of 'complainant' and are thus clothed with the necessary *locus standi* to make this application. There is also no dispute that the necessary statutory 30-day notice has been given.

First Issue Section 348(4)(a) – Whether The Applicants Are Acting In Good Faith

[47] The principles on leave to commence a statutory derivative action have been settled for some time in Malaysia. It is useful also to set out the jurisprudence from jurisdictions like Australia and Singapore besides Malaysia as the law is similar. The principles are:

(i) section 348(4) of the CA 2016 states that in deciding whether or not the leave shall be granted, the court shall take into account whether:

(a) the complainant is **acting in good faith**; and

(b) it appears *prima facie* to be **in the best interest of the company** that the application for leave be granted.

(emphasis added)

(ii) the burden is on a complainant to show on a balance of probabilities that he is acting in good faith. It is not a *prima facie* test. Leave to bring a derivative action must not be given lightly; (see *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808; [2011] 3 MLJ 636 per Abdull Hamid Embong JCA at [8 and 15]).

(iii) there is no presumption a complainant is acting in good faith. (See *Ang Thiam Swee v. Low Hian Chor* [2013] 2 SLR 340 Singapore CA, per VK Rajah JA at [18-19]).

(iv) there are at least two interrelated factors to which the courts will always have regard in determining whether the good faith requirement is satisfied. The first is whether the complainant honestly believes that a good cause of action exists and has a reasonable prospect of success. Whether the complainant honestly holds this belief would not simply be a matter of bald assertion: the complainant may be disbelieved if no reasonable person in the circumstances could hold that belief. The second factor is whether the complainant is seeking to bring the derivative suit for a collateral purpose as would amount to an abuse of process. (See *Swansson v. RA Pratt Properties Pty Ltd & Anor* [2002] NSWSC 583 per Palmer J at [36]).

(v) these two interrelated factors set out by Palmer J in *Swansson* have been used by our Court of Appeal in *Celcom (Malaysia) Bhd* at [15-16] and in *Tai May Chean* at [33-35].

(vi) but it is useful to note that Palmer J himself said at [35-37] that there can be more than these two factors.

(vii) this is what Palmer J said:

> [35] At this early stage in the development of the law on the statutory derivative action created by Pt 2F.1A *it would be unwise to endeavour to state compendiously the considerations to which the courts will have regard in determining whether applicants in all categories defined by s. 236(1) are acting in good faith. The law will develop incrementally as different factual circumstances come before the courts*.
>
> [36] Nevertheless, in my opinion, *there are at least two interrelated factors to which the courts will always have regard in determining whether the good faith requirement* of s. 237(2)(b) is satisfied. *The first is* whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. Clearly, whether the applicant honestly holds such a belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief. *The second factor* is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process.
>
> [37] *These two factors will, in most but not all, cases entirely overlap: if the court is not satisfied that the applicant actually holds the requisite belief, that fact alone would be sufficient to lead to the conclusion that the application must be made for a collateral purpose, so as to be an abuse of process*. The applicant may, however, believe that the company has a good cause of action with a reasonable prospect of success but nevertheless may be intent on bringing the derivative action, not to prosecute it to a conclusion, *but to use it as a means for obtaining some advantage for which the action is not designed or for some collateral advantage beyond what the law offers. If that is shown, the application and the derivative suit itself would be an abuse of the court's process*: …
>
> (emphasis added)

(viii) in determining whether a good cause of action exists and there is a reasonable prospect of success, the court should not interfere and substitute its own judgment if it was a proper and prudent business and commercial decision of the directors. (See *Celcom (M) Bhd* at [19]).

Singapore Position

[48] The Singapore Courts take a different approach on the interpretation of 'good faith'.

[49] They do not use the passage setting out the two interrelated factors in *Swansson* at [36] and used by our Court of Appeal in *Celcom (Malaysia) Bhd* at [15 - 16] and in *Tai May Chean* at [33-35]. Instead, the fountainhead of their jurisprudence is in a passage from the Singapore Court of Appeal judgment of *Pang Yong Hock v. PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1.

[50] This is what the Singapore Court of Appeal said in *Ang Thiam Swee via* VK Rajah JA:

> The requirement of good faith in a statutory derivative action
>
> 12 The issue of good faith in the context of a statutory derivative action is often obtruded by the qualification that this issue is a matter for the court to determine on the particular facts of each case. *Because of the susceptibility of "good faith" to casuistic assessment, a conceptual framework is needed to guide the court's exercise of its discretion. In Pang Yong Hock v. PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*"), this court began the process by directing at [20] that:
>
> > *The best way of demonstrating good faith is to show a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or at all*. Naturally, the parties opposing a s. 216A application will seek to show that the application is motivated by an ulterior purpose, such as dislike, ill-feeling or other personal reasons, rather than by the applicant's concern for the company. *Hostility between the factions involved is bound to be present in most of such applications*. It is therefore generally insufficient evidence of lack of good faith on the part of the applicant. However, *if the opposing parties are able to show that the applicant is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations that may be sufficient for the court to find a lack of good faith on his part*. An applicant's good faith would also be in doubt if he appears set on damaging or destroying the company out of sheer spite or worse, for the benefit of a competitor. It will also raise the question whether the intended action is going to be in the interests of the company at all. *To this extent, there is an interplay of the requirements in s 216A(3)(b) and (c)*.
>
> 13 It is clear from the above passage that the court ought to assess the motivations of the applicant in order to determine whether he is acting in good faith. It ought to be emphasised, however, that *the motivations of an applicant will only amount to a lack of good faith in so far as they go to show that "his judgment [has been] clouded by purely personal considerations"* (see *Pang Yong Hock* at [20]). This creates *a crucial link between the requirement of good faith* in s 216A(3)(b) *and the requirement in s 216A(3)(c), in that an applicant whose judgment is clouded by purely personal considerations may not honestly intend to serve the company's interests, and also may not be the proper party to represent the company's interests*. As such, it is not the questionable motivations of the applicant *per se* which amount to bad faith; instead, *bad faith may be established where these questionable motivations constitute a personal purpose which indicates that the company's interests will not be served*, *ie*, that s. 216A(3)(c) will not be satisfied. This crucial distinction between the applicant's motivation or motive on the one hand and his purpose on the other has been neatly encapsulated in Palmer J's judgment in *Swansson v. R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313 ("*Swansson*") at [41] as follows:

> To take another example: a derivative action sought to be instituted by a current shareholder for the purpose of restoring value to his or her shares in the company would not be an abuse of process even if the applicant is spurred on by intense personal animosity, even malice, against the defendant: it is not the law that only a plaintiff who feels goodwill towards a defendant is entitled to sue … On the other hand, an action sought to be instituted by a former shareholder with a history of grievances against the current majority of shareholders or the current board may be easier to characterise as brought for the purpose of satisfying nothing more than the applicant's private vendetta. An applicant with such a purpose would not be acting in good faith.

14 Canadian case law has over time unequivocally established that an applicant who acts out of self-interest need not be lacking in good faith. In *Primex Investments Ltd v. Northwest Sports Enterprises Ltd and 453333 BC Ltd* [1996] 4 WWR 54 ("*Primex Investments*"), which concerned s. 225 of the British Columbia Company Act (RSBC 1979, c 59) (now repealed and replaced by s 233 of the British Columbia Business Corporations Act (SBC 2002, c 57)), Tysoe J observed at [42] that:

> I have no doubt that the Petitioner is acting out of self-interest in wanting to prosecute the derivative action. The self-interest is to maximize the value of its shares in Northwest by pursuing causes of action which it may have against Mr. Griffiths and the other directors. The Petitioner's self-interest coincides with the interests of Northwest. This does not mean the Petitioner is acting in bad faith: see *Richardson Greenshields of Canada Ltd. v. Kalmacoff* [(1995) 22 OR (3d) 577]. Anything that benefits a company will indirectly benefit its shareholders by increasing the share value and it is hard to imagine a situation where a shareholder will not have a self-interest in wanting the company to prosecute an action which is in its interests to prosecute.

15 In *Richardson Greenshields of Canada Limited v. Kalmacoff et al* (1995) 22 OR (3d) 577 ("*Richardson Greenshields*") at 586-587, it was held that:

> ... [T]he extent of [the appellant shareholder's] stake, monetary or otherwise, in the outcome of these proceedings is of little weight in deciding whether it has met the good faith test applicable to the present circumstances. … I think it significant that the appellant has had a long-standing commercial connection with this class of shares and is familiar with the matters in dispute. It acknowledges that it has clients who purchased shares on its recommendation, and, it can be inferred from the shareholders' vote, that it voices the views of a substantial number of the preferred shareholders. Whether it is motivated by altruism, as the motions court judge suggested, or by self-interest, as the respondents suggest, is beside the point. Assuming, as I suppose, it is the latter, self-interest is hardly a stranger to the security or investment business. Whatever the reason, there are legitimate legal questions raised here that call for judicial resolution. ...

> 16 The general tenor which emerges from the case law is that good faith is dependent less on the motives which trigger the application for leave to bring a statutory derivative action, and more on the purpose of the proposed derivative action, which must have an obvious nexus with the company's benefit or interests. As this court noted in *Pang Yong Hock* at [20], "there is an interplay of the requirements in s. 216A(3)(b) and (c)" (see the passage extracted above at [12]).
>
> 17 Often, an applicant will have a number of overlapping motives, which in turn may cloud the identification of his principal purpose in seeking leave to commence a statutory derivative action. The present case involves just such a confluence of factors. …
>
> (emphasis added)

[51] The legislative intent is to provide a procedure for the protection of genuinely aggrieved minority interests and for doing justice to a company while ensuring that the company's directors are not unduly hampered in their management decisions by loud but unreasonable dissidents attempting to drive the corporate vehicle from the back seat. (See *Pang Yong Hock* at [19]).

Whether An Applicant Who Acquires His Shareholding After The Alleged Breach By The Company's Directors Is Lacking In Good Faith?

[52] Is there a lack of good faith and a collateral purpose when an applicant acquires his shareholding after the alleged breach by the company's directors?

[53] This is what the Singapore High Court said in *Tiong Sze Yin Serene v. HC Surgical Specialist Ltd* [2021] 3 SLR 1269 when dismissing an application for leave to bring a derivative action:

> 77 Finally, *the plaintiff was hardly the 'genuinely aggrieved shareholder' that s. 216A is meant to protect. She was not even a shareholder of the Company when she contacted the Company* on 5 September 2019 to tell Ms Ong about the Defamation Action. She requested but did not get to meet Dr Heah. She had no personal knowledge of Dr Heah's or the Board's internal deliberations leading up to the 19% Acquisition. *She then became a shareholder by buying the minimum traded lot of 100 shares in order to attend the Company's AGM* so that she could tell the shareholders about the Complaint and the Defamation Action.
>
> (emphasis added)

(based on the editorial note, the appeal was dismissed by the Singapore Court of Appeal with no written grounds of decision rendered. The Court of Appeal agreed with the High Court Judge that none of the requirements for leave to bring a statutory derivative action had been met).

Whether The Failure To Be Fully Candid Before The Court Would Indicate A Lack Of Good Faith

[54] The failure to be fully candid before the court would indicate a lack of good faith on the part of the complainant. In *Jian Li Investments Holding Pte Ltd v. Healthstats International Pte Ltd* [2019] 4 SLR 825, the Singapore High Court said:

> 48 *The good faith enquiry may also extend beyond the two main facets earlier identified*, honest and reasonable belief in the merits, and purpose for bringing the application. *It can also encompass considerations of the applicant's conduct in the proceedings*: Margaret Chew, Minority Shareholders' Rights and Remedies (LexisNexis, 3rd Ed, 2017) at para 6.043. For instance, *the failure to be fully candid before the court would indicate a lack of good faith*. In *Agus Irawan v. Toh Teck Chye* [2002] 1 SLR(R) 471 ('*Agus Irawan*') at [9], Choo Han Teck JC considered this to be relevant, and held that *good faith would have required the applicant to 'set out the story in full from the beginning but he did not do so'*. This was cited with approval in *Wong Kai Wah v. Wong Kai Yuan* [2014] SGHC 147 at [66], where Lee Kim Shin JC held that '[h]ints of lack of candour may justify an inference of a lack of good faith'.
>
> (emphasis added)

Factors Establishing Good Faith

[55] Arising from the cases I have set out above, the factors establishing good faith can be more than the two factors mentioned in *Swansson* and in *Celcom (Malaysia) Bhd*.

[56] To recap, as stated earlier, the test of good faith proposed by Palmer J in *Swansson* at [35-37] is two-fold. The first factor is whether the applicants honestly believe that a good cause of action exists and has a reasonable prospect of success. Whether the applicants honestly hold this belief would not simply be a matter of bald assertion: the applicants may be disbelieved if no reasonable person in the circumstances could hold that belief.

[57] The second factor is whether the applicants are seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process.

[58] As was also acknowledged by Palmer J in *Swansson* at [35], besides the two factors above, there can be other considerations to which the courts will have regard in determining whether the applicants are acting in good faith.

[59] One such consideration to my mind is whether the applicants have been candid before the court. Lack of candidness would indicate a lack of good faith. (See *Jian Li Investments Holding Pte Ltd* at [48]).

[60] Another consideration is that an applicant who acquires his shareholding after the alleged breach by the company's directors may indicate a lack of good faith. (See *Tiong Sze Yin Serene* at (77)).

A Suggestion

[61] Instead of the courts considering all these factors in isolation, in my view, it is better to consider all the facts in totality and determine whether the applicants have shown on a balance of probabilities that they are acting in good faith. If they fail to discharge this burden, bearing in mind leave to bring a derivative action must not be given lightly, the application for leave to commence a derivation action should be dismissed.

Application to facts

[62] The applicants assert that after reading the cause papers for OS103 and a press release by The Edge Markets on 10 April 2023 they, and I quote, "having an interest in corporate governance, the applicants decided to become the minority shareholder activists with the intention to act in the public shareholders' interest in questioning the independence of the fourth respondent's Board of Directors", unquote.

[63] This is what the applicants' written submissions encl. 43 at paras. 5, 6 and 7 said:

> 5. Sometime in April 2023, the Applicants opined that the 1st to 3rd Respondents, being the executive and/or non independent directors of the fourth Respondent, have breached their fiduciary duties towards the fourth Respondent by controlling and/or causing the fourth Respondent to be used as a vehicle to acquire shares of one company known as South Malaysia Industries Berhad (herein after referred to "SMIB").
>
> 6. **The above was based on the Applicants' knowledge derive from the cause papers for a suit, bearing suit no**. Kuala Lumpur Originating Summons No. WA-24NCC-103-02/2023 **and a press release by The Edge Markets on 10.4.2023**.
>
> - Ref to Cause Papers (part) from Kuala Lumpur Originating Summons No. WA-24NCC-103-02/2023 at exh "A-3", pdf pg 76 to 200 of Applicants' Affidavit Vol 1 (encl. 2), Applicants' Affidavit Vol 2 to Vol 6 (Encl. 3 to Encl. 7) and pdf pg 2 to 164 of Applicants' Affidavit Vol 7 (Encl. 8)
> - Ref to an Affidavit from Kuala lumpur Originating Summons No. WA-24NCC-269-05/2023 at exh. "A-3", pdf pg 165 to 202 of Applicants' Affidavit Vol 7 (encl. 8), Applicants' Affidavit Vol 8 (encl. 9) and pdf pg 2 to 63 Applicants' Affidavit Vol 9 (encl. 10)
> - Ref to Press Release by The Edge Markets on 10.4.2023 at Exh. "A-3", pdf pg 64 to 66 of Applicants' Affidavit Vol 9 (Encl. 10)

> 7. The Applicants were of the view that 1st to third Respondents' abovementioned actions are highly questionable. Due to the aforesaid and **having an interest in corporate governance, the Applicants decided to become the minority shareholder activists** with the intention to act in the public shareholders' interest in questioning the independence of the fourth Respondent's board of directors.
>
> (emphasis added)

[64] If the applicants' story set out above is honestly believed by the applicants, it is indeed benevolent and laudable of the applicants to incur time not to mention expense to buy shares in the fourth respondent to become minority shareholder activists because of an interest in corporate governance. It is also admirable of them to also incur time and legal expense to file this derivative leave OS.

[65] However, no evidence has been presented to the court to show that the applicants have a track record of having an interest in corporate governance, are members of any NGOs involved in corporate governance or have previously engaged in corporate governance litigation as minority shareholder activists.

[66] Instead, the evidence before the court reveals that the first applicant, Irene Wong Sook Lin, was previously practising in the law firm of Messrs GTRZ who are the solicitors for SMI, which is the target company in a corporate fight between SMI and two subsidiaries of Prolexus Berhad, the fourth defendant, now before the courts, the facts of which I have set out above. Mr Gideon Tan also appears as counsel for the applicants before me.

[67] The applicants are unable to dispel the respondents' contention that they are agents provocateurs planted to create trouble for the respondents. The lack of candidness on the part of the applicants indicates a lack of good faith as explained in *Jian Li Investments Holding Pte Ltd v. Healthstats International Pte Ltd* [2019] 4 SLR 825, which I have referred to above.

[68] I am also of the view, based on the same set of facts that I have narrated that the applicants have failed to show on a balance of probabilities that they are not seeking to bring the derivative suit for a collateral purpose.

[69] No reasonable person would also honestly believe that a good cause of action exists and has a reasonable prospect of success if I were to grant leave. My reasons are as follows.

[70] The applicants contend that they will, I quote "demonstrate that there is breach of director's duty on the part on first to third respondents in managing the business and affairs of the fourth respondent company", unquote. (See applicants' written submissions encl. 43 para. 3).

[71] The applicants contend that the breaches include the following:

(i) there is a highly probable case where the fourth respondent was used as a vehicle in their acquisition of SMI shares and their attempt to seize control of SMI, which does not have any synergies and/or expertise to manage SMI; and

(ii) the first to third respondents failed to disclose their personal interest and/or their connection with persons acting in concert ("PACs") and/or the interest of the PACs who have collectively acquired SMI's shares in the same period of time.

(See applicants' written submissions encl. 43 paras. 3 to 3.2).

First Contention

[72] The applicants' first contention is not supported by any evidence to show, I quote, "the fourth respondent was used as a vehicle in their acquisition of SMI shares and their attempt to seize control of SMI which does not have any synergies and/or expertise to manage SMI", unquote.

[73] Instead, the applicants rely on the failure of the first to third respondents to answer substantively their queries contained in their solicitors' letter, giving the requisite 30-day notice prior to the filing of the derivative leave OS.

(See applicants' written submissions encl. 43 para. 21.1 and correspondence between the parties' solicitors at exhs. A-4 to A-7 at pp. 1875 to 1899/pp. 68 to 93 of applicants' affidavit vol. 10 (encl. 11)).

[74] The applicants' counsel relies on *Lembaga Tabung Angkatan Tentera v. Prime Utilities Bhd* [2013] 8 CLJ 38; [2013] 7 MLJ 831.

[75] In *Lembaga Tabung Angkatan Tentera v. Prime Utilities Bhd* [2013] 8 CLJ 38; [2013] 7 MLJ 831, Hasnah Mohammed Hashim J granted leave to commence derivative action as the plaintiff therein had written to the defendant requesting for an explanation for the latter's failure to pursue the recovery of an investment but the directors of the defendant have failed to respond to that letter. The court held that the Board of Directors in their capacity as custodian of a company owe a duty to explain their action:

> [25] The directors of the defendant must exercise skill, care and diligence in performance and discharge. As the custodian of the defendant the directors are duty bound to explain their actions to the plaintiff. ...

[76] I agree with the reasoning by Hasnah Mohammed Hashim J in *Lembaga Tabung Angkatan Tentera v. Prime Utilities Bhd* [2013] 8 CLJ 38; [2013] 7 MLJ 831.

[77] However, in the case before me, the respondents did give a substantive reply explaining the process upon which the investment in SMI was made. The respondents averred that the decision was made by the investment

committee consisting of the second respondent as an executive director and one Low Chin Koon who is an independent non-executive director based on a watch list of 14 companies and the financial scoring of SMI based on seven factors like gross margin, sales growth and total assets growth. The recommendations of the investment committee has been exhibited.

(See encl. 13 affidavit in reply dated 4 September 2023 in paras. 8 until 18 and exh. B2 at pp. 157 to 159).

[78] The respondents' counsel also submit that the fourth respondent's investment in SMI is intact and there is no allegation that the directors of the fourth respondent have failed to protect the fourth respondent's investment as was the case in *Lembaga Tabung Angkatan Tentera*.

[79] In my view, a court should not interfere and substitute its own judgment in the business and commercial decision of the directors in the absence of any evidence showing improper conduct by the directors or that the decision was not honestly made.

[80] In *Celcom (Malaysia) Bhd*, the Court of Appeal said:

> [19] It was submitted by learned counsel of the appellant that based on those background facts the decision of the independent directors was an exercise of the prudent business judgment rule by a completely honest and disinterested section of the board of directors of the appellant at that material time, which was based on independent legal advice. *We agree that the court should thus not interfere and substitute its own judgment in what we hold to be was a proper and prudent business and commercial decision of the directors. Re Winpac Paper Products Pte Ltd; Seow Tiong Siew v. Kwok Low Mong Lawrence & Ors* [2000] 4 SLR 768 was cited in support of this proposition by reading this passage:
>
> > On the basis of the legal advice and in some of them, for commercial reasons, they decided against pursuing the claims. *It has not been shown that their decisions were not honestly made*.
>
> [20] It was also pointed out to us that the intended statement of claim, does not show how the independent directors can be faulted for their decision and that there was no averment that they had conspired with the TM. We agree with the appellant's stand that the learned judge had failed to consider these factors in allowing for the leave, thus *ignoring the principle that leave should not be too easily allowed in an application of this nature*. We also find that the action does not have any reasonable chance of success, for reasons mentioned later in this judgment.
>
> (emphasis added)

[81] In conclusion, the applicants have failed to show on a balance of probabilities that "the fourth respondent was used as a vehicle in their acquisition of SMI shares and their attempt to seize control of SMI which does not have any synergies and/or expertise to manage SMI".

Second Contention

[82] The second contention of the applicants is that the first to third respondents failed to disclose their personal interest and/or their connection with persons acting in concert ("PACs") and/or the interest of the PACs who have collectively acquired SMI's shares in the same period of time.

[83] This contention that the first to third respondents acted with persons acting in concert ("PACs") to collectively acquire SMI's shares has not been proven by the applicants on a balance of probabilities. No proof has been shown by the applicants.

[84] Further, a complaint had been made to the SC and rejected by the SC, as reported in the Edge on 19 March 2024. The Edge also reported that SMI had filed for a judicial review. (See encl. 46 respondents' written submissions on reply annexure A).

[85] It is settled law that it is for the SC to determine that there is any contravention of the CMSA and it is not for the court to usurp the role of the regulators. (See *Shahidan Shafie v. Atlan Holdings Sdn Bhd & Anor* [2017] 4 CLJ 587 followed in *Lai Soon Onn v. Chew Fei Meng & Other Appeals* [2018] 10 CLJ 48; [2019] 2 MLJ 96).

[86] In *Shahidan Shafie v. Atlan Holdings Sdn Bhd & Anor* [2017] 4 CLJ 587, the Court of Appeal held:

> [26] It is our view that premised on the aforesaid provisions, it can be said that it is the intention of Parliament for the Securities Commission to be tasked to supervise, regulate, issue rulings from time to time and enforce the practices of companies bound by the SC Act 1993 and the Take-Over Code. The learned judge in the High Court in fact found that *the only remedy available to the plaintiff was to complain to the Securities Commission about the conduct of the defendants and if the Securities Commission failed to act or makes a ruling unfavourable to the plaintiff, his only option was to apply to the court for judicial review of the decision of the Securities Commission. In short, the plaintiff's remedy was one of public law*.
>
> ...
>
> [28] As we have intimated earlier, in construing s. 153 we must take into consideration of other provisions in the SC Act to discern the context. Hence in doing so, we agree with learned counsel for the defendants that the plaintiff's right to sue can only exist when the Securities Commission had made a ruling. In the case before us, the Securities Commission must first make a ruling that the defendants had acquired control of Naluri in the context of the relevant law and was required to make the mandatory take-over offer to the shareholders of the Naluri. From the record of Appeal, it is undisputed that the Securities Commission was aware of the allegation of the defendants having 'acquired control' of Naluri and had sought clarification from the Board of Directors of Naluri. The Securities Commission after considering Naluri's clarification took no further action. As intimated above, the plaintiff should have sought a review of the Securities Commission decision in court. This he did not do.

[29] If we were to adopt the interpretation of s. 153 of the SC Act of the plaintiff, it would amount to the court stepping into the shoes of the Securities Commission which is tasked to supervise and regulate the conduct of companies. As we have said earlier, that is not and cannot be the intention of Parliament. Our interpretation reconciles s. 153 with the other provisions in the SC Act and that is the private cause of action for breach of statutory duty is preserved to the extent only after the Securities Commission has made a specific ruling. This would avoid a situation where there would be two decisions, one of the court and the other the Securities Commission. This scenario would bring uncertainty to the business world which must be avoided. Our interpretation allows only one decision at one time and that is the decision of the Securities Commission until the same is either set aside or substituted by the courts.

(emphasis added)

[87] In *Lai Soon Onn v. Chew Fei Meng & Other Appeals* [2019] 2 MLJ 96, the Court of Appeal held at [42] and [43]:

[42] Similarly, *it is not for the courts to usurp the function of the market regulatory bodies in carrying out its objective as stipulated under the law*. The functions of the SC are statutorily provided in s. 15(1)(d) of the SCA, where it is tasked to regulate the take-over and mergers of companies. Section 217(4) of the CMSA provides that:

> The Commission shall administer the Code and may do all such things as may be necessary or expedient to give full effect to the provisions of this Division and the Code and without limiting the generality of the foregoing:
>
> (a) Issue rulings:
>
> (i) to interpret this Division and the Code;
>
> (ii) on the practice and conduct of persons involved in or affected by any take-over offer, merger or compulsory acquisition, or in the course of any take-over, merger or compulsory acquisition; and
>
> (b) Enquire into any matter relating to any take over offer, merger or compulsory acquisition whether potential or otherwise, and for this purpose, may issue public statements as the Commission thinks fit with respect thereto.

[43] *Gleaning through the provisions of the CMSA, it is the intention of the Act that the bodies established under the Act are regulatory bodies and it is not the function of the court to usurp their function nor to second guess their decisions*. In *R v. International Stock Exchange of UK and Ireland, ex parte Else Ltd*; *R v. International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Else (1982) Ltd and another*; *R v. International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Roberts* [1993] 1 All ER 420; [1993] QB 534, *Lord Bingham observed that 'the court will not second guess the informed judgment of responsible regulators steeped in knowledge of their particular market'*. This court applied the same principle in *Shahidan*

A *Shafie* in arriving at its decision when interpreting s. 153 of the SCA. To interpret otherwise would result in a situation where there would be two decisions, one of the court and the other from the SC. That cannot be the position in law (refer to paragraph 29 of *Shahidan Shafie*). The courts have shown a reluctance to interfere with the decision of regulatory bodies in carrying out its objective in the absence of *mala fide* or acting
B in excess of jurisdiction. A similar stance was taken by this court in *Bursa Malaysia Securities Berhad* and also in *Khiudin bin Mohd & Anor v. Bursa Malaysia Securities Bhd And Another Application* [2012] 6 MLJ 131 which had referred to various Commonwealth jurisdictions, which demonstrated the attitude of the courts in reviewing the decision made by the regulators in different jurisdictions. Therefore, it is not within this court's jurisdiction
C to interfere with the duties mandated to the market regulatory bodies in maintaining and promoting the interests of the public in dealing on the exchange and these bodies should be left to carry out its objective as stipulated under the Act.

(emphasis added)

D **[88]** In conclusion, in my view, the applicants have failed to show on a balance of probabilities that they are acting in good faith. On this ground alone, the application for leave to issue a derivative action can be dismissed.

[89] I now move on to the second issue for completeness. Assuming that the court finds the applicants are acting in good faith and that their claim
E appears genuine, the court must nevertheless weigh all the circumstances and decide whether, *prima facie*, it is in the best interest of the company *ie*, the fourth respondent for the claim to be pursued.

Second Issue Section 348(4)(b) – Whether It Appears Prima Facie To Be In The
F *Best Interest Of The Company, ie, Fourth Respondent That The Application For Leave Be Granted*

[90] The following principles can be distilled from decided cases:

(i) leave to bring a derivative action must not be given lightly;

G (ii) the burden is on the complainant to show that it appears *prima facie* to be in the best interest of the company that the application for leave be granted;

(iii) the issue here is not whether the claim is meritorious or not. The court can take into account the fact that a company may have genuine
H commercial consideration for not wanting to pursue certain claims.

(See *Celcom (M) Bhd* at [28] citing *Swansson* at [8], *Pang Yong Hock* and the Canadian case of *Ontario Ltd v. Bernstein* (2000 OTC Lexis 3480) (2000 OTC 758) at [28]).

I **[91]** This is what the Court of Appeal in *Celcom (Malaysia) Bhd* said through Abdull Hamid Embong JCA on the old s. 181B(4) of the CA 1965 which is similar to our present s. 348(4) of the CA 2016:

[8] ... As such, *leave to bring a derivative action must not be given lightly* (see *Swansson v. RA Pratt Properties Pty Ltd & Anor* [2002] NSWSC 583). Thus, once leave is granted the defendants in this case cannot revisit the issue on the grant of leave. Granting leave is therefore final in that sense and not interlocutory in character. In this respect, the learned judge was wrong in stating cursorily that the matter before him was 'only an application for leave' and relying on the low threshold used under O. 53 of the RHC (application for judicial review), *ie* to determine if an application for judicial review is not frivolous or vexations by relying on cases like *Clear Water*. The learned judge must as a matter of judicial prudence exercise a greater caution in satisfying himself that the requirements under s. 181A of the CA are met. *A low threshold of merely determining if there existed a prime facie case is therefore a wrong basis for granting the leave. There needs to be a strict interpretation of s. 181A of the CA, and compliance to those statutory requirements* ...

[15] The second crucial requirement for the determination of the court in granting leave is *the need for the respondent to show that he was acting in good faith in making this application* (s. 181B(4)(a)). The *onus of proof here is on the respondent on a balance of probabilities. The test of good faith is two-fold*. One is an *honest belief* on the part of the respondent, and two, that this application is not brought up for a *collateral purpose*.

...

[16] This second requirement ... This was stated by Palmer J in *Swansson* with these words:

> Nevertheless, in my opinion, there are at least *two interrelated factors to which the courts will always have regard in determining whether the good faith requirement of s. 237(2)(b) is satisfied*. The first is whether the applicant *honestly believes* that *a good cause of action exists* and has *a reasonable prospect of success*. Clearly, whether the applicant honestly holds this belief would not simply be a matter of bald assertion: *the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief*. The second factor is whether the applicant is seeking to bring the derivative suit for such *a collateral purpose* as would amount to an abuse of process.

...

[19] It was submitted by learned counsel of the appellant that based on those background facts the decision of the independent directors was an exercise of the prudent business judgment rule by a completely honest and disinterested section of the board of directors of the appellant at that material time, which was based on independent legal advice. We agree that the court should thus not interfere and substitute its own judgment in what we hold to be was a proper and prudent business and commercial decision of the directors. *Re Winpac Paper Products Pte Ltd; Seow Tiong Siew v. Kwok Low Mong Lawrence & Ors* [2000] 4 SLR 768 was cited in support of this proposition by reading this passage: On the basis of the legal advice and in some of them, for commercial reasons, they decided against pursuing the claims. It has not been shown that their decisions were not honestly made.

[20] *It was also pointed out to us that the intended statement of claim, does not show how the independent directors can be faulted for their decision and that there was no averment that they had conspired with the TM*. We agree with the appellant's stand that the learned judge had failed to consider these factors in allowing for the leave, thus *ignoring the principle that leave should not be too easily allowed* in an application of this nature. *We also find that the action does not have any reasonable chance of success*, …

[28] … The test of the interest of the company can be found in the Singapore case of *Pang Yong Hock And Another v. PKS Contracts Services Pte Ltd* [2004] SGCA 18 [2004] 3 SLR 1, in this passage:

> *Having established that an applicant is acting in good faith and that a claim appears genuine, the court must nevertheless weigh all the circumstances and decide whether the claim ought to be pursued*. Whether the company stands 'to gain substantially in money or in money's worth' (per Choo JC in *Agus Irawan*) relates more to the issue of whether it is in the interests of the company to pursue the claim rather than whether the claim is meritorious or not. *A $100 claim may be meritorious but it may not be expedient to commence an action for it*. The company may have genuine commercial consideration for not wanting to pursue certain claims. Perhaps it does not want to damage a good, long-term, profitable relationship. It could also be that it does not wish to generate bad publicity for itself because of some important negotiations which are underway.

And from Canada, in the case of *Ontario Ltd v. Bernstein* (2000 OTC Lexis 3480) (2000 OTC 758), we quote this passage:

Justice Brandeis … stated:

> *Whether or not a corporation shall seek to enforce in the courts a course of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors*, in the absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment.
>
> (emphasis added)

Application To Facts

[92] The applicants contend that after the companies bought the shares in SMI, "the fourth respondent company suffered monetary loss in light of a sharp decline in SMI's share price since the acquisition of SMI's shares". (See encl. 48 para. 30.1). When I asked for proof, counsel candidly admitted to me that there is no proof of such losses exhibited.

[93] To my mind, the applicants have failed to show that it appears *prima facie* to be in the best interest of the company that the application for leave be granted. My reasons are as follows:

(i) the applicants acquired a total of 46,000 shares for the sole purpose to obtain the *locus standi* to file this derivative leave OS. Their total shareholding of 46,000 out of 276,727,513 issued shares of the fourth respondent is a mere 0.00017%. None of the other 99.99983% shareholders share their grievance;

(ii) the companies' investment in the shares of SMI were carried out before the applicants acquired shares in the fourth respondent and before the applicants became members of the fourth respondent. In these circumstances, the applicants' interests as members of the fourth respondent are not affected at all by the said investment. Indeed, the applicants had decided to acquire the shares in the fourth respondent with full knowledge of the companies' investment in the shares of SMI.

(iii) the applicants' case is premised upon a complaint by SMI, which is the SMI complaint. In the SMI complaint, it was alleged that there was a purported breach of s. 218 of the CMSA by the companies. It is settled law that it is for the SC to determine that there is any contravention of the CMSA. It is not for the court to usurp the role of the regulators. In any event, the SMI complaint has been rejected by the SC.

[94] Ultimately, it has not been proven to me that the applicants are genuinely aggrieved minority interests. As held in *Pang Yong Hock* by the Singapore Court of Appeal:

> 19 In our opinion, the approach taken in the two cases above is generally beyond reproach. It is consonant with the legislative intention of providing a procedure **for the protection of genuinely aggrieved minority interests** and for doing justice to a company while ensuring that the company's directors are not unduly hampered in their management decisions by loud but unreasonable dissidents attempting to drive the corporate vehicle from the back seat.
>
> (emphasis added)

Decision

[95] The application for leave to commence a derivative action against the first to third respondents in the name of the fourth respondent (encl. 1) is dismissed with costs of RM50,000 to be paid jointly and severally by the applicants to the respondents subject to allocatur.